

### **REMARKS**

In the Final Office Action dated December 28, 2009, claims 1-46 were pending. Claims 1-35, 37 and 40-45 were withdrawn from consideration as directed to non-elected subject matter. Claim 36, 38-39 and 46 were examined to the extent that these claims read on elected SEQ ID NO: 7 and its variants.

It is noted that the Examiner omitted claim 46 from the list of pending claims set forth on page 1 of the Office Action. Additionally, claim 46 was not included in any of the rejections discussed on pages 2-9 of the Action, yet not listed as allowed on page 1 of the Action. Applicants respectfully request clarification from the Examiner in the next Office Action.

Claims 38 and 39 are rejected under 35 U.S.C. §112, first paragraph, as allegedly failing to comply with the written description requirement. While acknowledging that the specification discloses indole-3-acetic acid (IAA) as an example of metabolites from actinomycete isolates, the Examiner contends that the specification fails to provide evidence that the applicant is in possession of the genus of metabolites and antibodies, as claimed.

With regard to metabolites, in an effort to favorably advance prosecution and without prejudice or disclaimer, Applicants have deleted claim 38 (drawn to an isolated metabolite) and have amended claim 39 by deleting the reference to metabolite. Applicants reserve the rights to pursue the subject matter relating to metabolites in a continuation application.

With regard to antibodies, the antibody of claim 39, as amended, is directed to the actinomycete of claim 36 or 46. Applicants respectfully submit that those skilled in the art would appreciate that such antibody can be readily prepared, and thus there is no need for the specification to explicitly detail the generation of such antibodies. The specification includes a

general description in relation to producing antibodies (see, e.g., page 84 of the substitute specification submitted on September 21, 2009), and the techniques for generating antibodies are well-known in the art.

Therefore, it is respectfully submitted that claim 39, as amended, fully satisfy the written description requirement of 35 U.S.C. §112, first paragraph. Withdrawal of the rejection is therefore respectfully requested.

Claim 36 was rejected under 35 U.S.C. §102(b) as anticipated by Shimizu et al. (*J. Gen. Plant Pathol.* 66: 360-366, 2000).

The reference allegedly discloses endophytic actinomycetes as a controlling agent against fungus disease. The Examiner previously acknowledged that the elected species represented by SEQ ID NO: 7 is free of prior art. However, the Examiner maintains that the claim encompasses variants of SEQ ID NO: 7 because of the claim language referring to low stringency hybridization conditions.

In an effort to favorably advance prosecution, and without prejudice or disclaimer, Applicants have amended claim 36 to recite "high stringency" conditions, as supported by the specification, e.g., page 50, lines 6-20 of the substitute specification. It is respectfully submitted that claim 36, as amended, is not anticipated by Shimizu. Withdrawal of the rejection is therefore respectfully requested.

Applicants further respectfully submit that claim 36 has been additionally amended to re-instate the non-elected species (a-d and g-r) that have been deleted from original claim 36 without prejudice. The re-instated species find support in original claim 36. Applicants wish to remind the Examiner of the provisions of 37 C.F.R. §1.141; namely, Applicants are entitled to examination of additional species once a generic claim is found to be allowable. Currently claim

36 is generic relative to the elected species of SEQ ID NO: 7. Therefore, Applicants should be entitled to examination of additional species once claim 36 is found allowable based on examination of the elected species of SEQ ID NO: 7.

Further, claim 46 has been amended to recite "98% identity". New claim 47, dependent on claim 46, further defines the sequence identity with SEQ ID NO: 7 to be "greater than 99%". Support for amended claim 46 and new claim 47 is found in the specification, e.g., page 47 of the substitute specification.

New claim 48, dependent on claims 36, 46 and 47, recites that the "actinomycete is of the species *Streptomyces triticum* var. *griseoviride*". Support for claim 47 is found in the substitute specification, e.g., pages 92-96 (Example 3).

No new matter is introduced by the foregoing amendments.

In view of the foregoing amendments and remarks, it is firmly believed that the subject application is in condition for allowance, which action is earnestly solicited.

Respectfully submitted,



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